

REMARKS

I. Status of the Claims

No claims are amended in this Reply. Claims 1-38 and 40-43 were previously canceled. Claims 39 and 44-47 remain pending.

In the final Office Action, all claims are rejected under 35 U.S.C. § 103 as obvious over PCT Publication WO 00/44375, Harper, published August 3, 2000, in view of U.S. Patent 6,335,361, Hamilton, published January 1, 2002. As discussed below, Applicants invented the subject matter of the present invention before the effective date of both Harper and Hamilton. Thus, Applicants submit that the rejection be withdrawn.

II. Declaration Under 37 C.F.R. § 1.131 of Dr. Zicker

Attention is respectfully drawn to the enclosed Declaration of Dr. Zicker, one of the inventors. In the Declaration, Dr. Zicker demonstrates that the invention of claims 39 and 44-47 was made on a date earlier than November 3, 1999. The showing of prior invention is sufficient to antedate the Harper and Hamilton references applied against the claims, as discussed further below.

The current claims have an effective filing date of October 31, 2000, based on support for the claims in Provisional Application No. 60/244,510 filed that day, from which the current application claims priority. In particular, compared to the current specification, the provisional contains the same description of the cognitive testing, the same description of the diet, and the same Examples 1 and 2 giving the results of the tests.

Applicants note that the effective filing date is less than one year later than the effective date of either of the Hamilton or Harper references. For this reason, neither reference is a bar under 35 U.S.C. § 102(b). As a consequence, the references can be removed by a showing of prior invention.

The Examiner's attention is also drawn to prosecution in serial no. 11/154,210 before Examiner Simmons. There, a similar Rule 131 declaration has been submitted to

antedate similar applied references. In particular, sections 5-14 of the current declaration are largely taken from the '210 declaration.

The enclosed Declaration of Dr. Zicker demonstrates that the invention was made earlier than November 3, 1999. Conception of the invention is evidenced by process formulation sheets printed earlier than the effective date and corroborated by the initials of a plant manager earlier than the effective date. Appendices A, B and C and Dr. Zicker's comments demonstrate that a composition containing the four antioxidants recited in the claims was made earlier than the effective date. Appendices D and E and Dr. Zicker's comments demonstrate that the inventive concept of feeding the antioxidant diet to aged pets was also conceived before the effective date of November 3, 1999.

In particular, sections 15-21 discuss Appendix D, which gives evidence of conception of the invention and plans for testing at the Lovelace Respiratory Research Institute (LRRI). As explained by Dr. Zicker, Appendix D is dated earlier than November 3, 1999 and shows the inventors had proposed to test dog diets having the four claimed antioxidants (vitamin E, vitamin C, carnitine, and lipoic acid) in order to prevent cognitive decline. As explained by Dr. Zicker, prevention of cognitive decline encompasses the claimed methods of inhibiting the loss of learning ability or increasing the learning ability of an aged companion pet in need of such treatment.

The discussion of Appendix E in sections 22-26 conclusively demonstrates the inventors were in possession of the claimed method before the critical date. Specifically, Appendix E shows that the inventors had settled on a formula that contained all four antioxidants for use in the claimed method.

Conception of the invention as shown in Appendices D and E is corroborated by Appendices A, B, and C discussed in sections 5-14 of the declaration. These appendices show that the inventors had made a dog diet having the four antioxidants in the claimed ranges. Dr. Zicker's sworn testimony establishes that the composition conceived and formulated in Appendices A, B, and C was intended for animal testing at LRRI as shown in Appendices D and E.

The touchstone of prior invention is conception. The sworn facts in Dr. Zicker's declaration unequivocally establish conception of the claimed invention prior to the effective dates of the cited references.

III. The Hamilton Reference, US 6,335,361

The Hamilton reference has an earliest possible effective date of November 3, 1999, based on its claim of priority to Provisional Application No. 60/163,352 filed that day. For the purposes of this discussion, Applicants assume, without conceding, that the November 3, 1999 provisional has the same disclosure as the January 1, 2002 publication. The effective date of the Hamilton reference is, accordingly, less than one year earlier than the effective filing date of the current claims. Thus, the Hamilton reference is not a bar under 35 U.S.C. § 102(b); it can be removed by a showing the invention was made earlier than the reference's effective date.

Applicants respectfully submit that the Hamilton reference is effectively removed as prior art by Dr. Zicker's showing in the Declaration that the invention was made earlier than its effective date of November 3, 1999. For this reason, Applicants respectfully request the rejection over the Hamilton reference be withdrawn.

IV. The Harper Reference, WO 00/44375

The earliest effective date of the Harper reference is its international filing date of January 31, 2000, which is less than one year before the earliest effective date of the claims, as described above. Accordingly, the Harper reference is not a bar under 35 U.S.C. § 102(b) and as such can be removed as prior art by a proper showing of prior invention.

As demonstrated above in the discussion of the Hamilton reference, Applicants have demonstrated that they made the claimed invention earlier than November 3, 1999. Such a showing is sufficient to show the invention was made earlier than the earliest effective date of the Harper reference. Thus, the Harper reference has been removed as prior art by a showing of earlier invention.

Because Harper is not available as prior art, Applicants respectfully request the rejections using the Harper reference be withdrawn.

V. Allowable Claims 39 and 44-47

The Hamilton and Harper references applied against the claims in the Office Action of June 29, 2007 have been removed by a showing of prior invention. There being no other rejections of record, Applicants believe that the claims are now in an allowable condition and respectfully request an early Notice of Allowance.

The Examiner is invited to telephone the undersigned if that would be helpful to resolving any issues.

Respectfully submitted,

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